No. 11,555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PAUL J. ZIEGLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Comes now the Appellant in the above entitled cause and presents his Petition for Rehearing of the above entitled cause and, in support thereof, respectfully shows:

That the opinion of this Honorable Court in this case is at variance with the Transcript of Record and is contrary to law in the following particulars:

I.

The decision of this court, based upon the finding by this Court that there was substantial evidence that Appellant was a member of the partnership of West Coast Supply Company, is directly contrary to the record and is an invasion, by this Court, of the province and functions of the jury since the lower court had instructed the jury, as a matter of law, that the evidence adduced at the trial

was insufficient to prove Appellant was a partner of the West Coast Supply Company [R. 625].

A. The decision of this Court affirming the judgment of conviction on Counts 1, 3, 5 and 7 is erroneous because it is predicated upon the premise that Appellant was a depositor as defined by Third Revised Ration Order No. 3, Section 24.1(c)(9) since he was one of the partners of West Coast Supply Company in which name and on which account the ration checks were purportedly drawn, when the record shows that the lower court instructed the jury, as a matter of law, that there was insufficient evidence to prove that Appellant was a member of the partnership [R. 625]. If he was not a member of the partnership, it was not his account and he was not a depositor. Therefore, one of the elements of the offense was not proved under Counts 1, 3, 5 and 7.

B. The decision of this Court affirming the judgment of conviction on Counts 2, 4, 6 and 8 is erroneous because it is predicated upon the premise that Appellant was a partner of the West Coast Supply Company, and the receiving of the sugar by West Coast Supply Company was the receiving of a rationed commodity by Appellant since he was a member of said partnership, when the record shows that the lower court instructed the jury, as a matter of law, that there was insufficient evidence to prove that Appellant was a member of the partnership and that the jury must find that Appellant was not a partner of West Coast Supply Company [R. 625].

I.

The Decision of This Court, Based Upon the Finding by This Court That There Was Substantial Evidence That Appellant Was a Member of the Partnership of West Coast Supply Company, Is Directly Contrary to the Record and Is an Invasion, by This Court, of the Province and Functions of the Jury Since the Lower Court Had Instructed the Jury, as a Matter of Law, That the Evidence Adduced at the Trial Was Insufficient to Prove Appellant Was a Partner of the West Coast Supply Company [R. 625].

A. The Decision of This Court Affirming the Judgment of Conviction on Counts 1, 3, 5 and 7 Is Erroneous Because It Is Predicated Upon the Premise That Appellant Was a Depositor as Defined by Third Revised Ration Order No. 3, Section 24.1(c) (9) Since He Was One of the Partners of West Coast Supply Company in Which Name and on Which Account the Ration Checks Were Purportedly Drawn, When the Record Shows That the Lower Court Instructed the Jury, as a Matter of Law, That There Was Insufficient Evidence to Prove That Appellant Was a Member of the Partnership [R. 625]. If He Was Not a Member of the Partnership, It Was Not His Account and He Was Not a Depositor. Therefore, One of the Elements of the Offense Was Not Proved Under Counts 1, 3, 5 and 7.

This Court found that there was substantial evidence that Appellant was a member of the partnership of West Coast Supply Company despite the fact that the lower court withdrew and excluded from the jury the issue of whether or not Appellant was a member of the partner-

ship, West Coast Supply Company. In that connection, the lower court instructed the jury as follows:

> "You are instructed that the evidence adduced at the trial was insufficient to prove the defendant, Paul J. Ziegler, was at any of the times mentioned in any or all counts of the information a partner of the West Coast Supply Company. *You will accordingly find, therefore, that Paul J. Ziegler was not at any of the times mentioned in the information a partner of the said West Coast Supply Company.*" [R. 625.] (Emphasis supplied.)

As noted by this Court in its opinion on page 7, Appellant's contention on appeal was that he did not have "an 'account,' as defined in subparagraph (1) of paragraph (c) of §24.1 of Third Revised Ration Order No. 3, and hence was not a 'depositor,' as defined in subparagraph (9) of paragraph (c). and that therefore the ration checks drawn by him were not 'checks,' as defined in subparagraph (5) of paragraph (c)." This Court decided that Appellant was a partner; that because he was one of the partners of the West Coast Supply Company, the accounts of that Company were his accounts, and he was, therefore, a depositor as defined in subparagraph (9), and the checks drawn by him were checks as defined in subparagraph (5). In order to arrive at this conclusion, this Court necessarily had to find that Appellant was a partner of the West Coast Supply Company. Otherwise it is obvious that the Court would have had to conclude that Appellant did not have a ration account within the meaning of the provisions of Third Revised Ration Order No. 3 heretofore mentioned.

One of the grounds of the Motion for Judgment of Acquittal [R. 311-15] and which was renewed at the conclusion of the case [R. 443-451] was that the evidence

was insufficient to prove that Appellant was a depositor or had an account within the meaning of Third Revised Ration Order No. 3, and that, therefore, the purported checks were not checks within the meaning of such Ration Order. Consequently, there was a failure of proof as to Counts 1, 3, 5 and 7.

Counts 1, 3, 5 and 7 charged an offense under Section 15.7 (d) of Third Revised Ration Order No. 3 which provides:

> "Overdrafts Prohibited. No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account."

Under the foregoing section, in order to be an overdraft the check would have to be issued on the account of the depositor. Otherwise no offense would be stated under this section. Subparagraph (5) of paragraph (c) of Section 24.1 of the above mentioned Ration Order provides:

> " 'Check' means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account * * *"

and subparagraph (9) provides:

> " 'Depositor' means a person who has a ration bank account. * * *"

In reviewing the ruling of the lower court on the Motion for Judgment of Acquittal, this Court concluded there was substantial evidence that Appellant was, in fact, a mem-

ber of the partnership, West Coast Supply Company, in which name the ration account was carried. This Court stated on page 4 of the opinion:

> "At all pertinent times, *appellant* and his father (John H. Ziegler) and brothers (Allen S. Ziegler and Raymond M. Ziegler) were partners doing business in Los Angeles, California, under the name West Coast Supply Company." (Op. p. 4.) (Emphasis supplied.)

And again:

> "These contentions are based on the false assumption that West Coast Supply Company and appellant were distinct entities. As indicated above, the evidence showed that West Coast Supply Company was a partnership the members of which were appellant and his father and brothers.[12]" (Op. p. 7.)

Also this Court, on page 7 of its opinion, in footnote 12, stated:

> "Although he denied it, there was substantial evidence that appellant was, in fact, a member of the partnership."

Apparently this Court was in accord with the contention that one of the elements of proof necessary to sustain a conviction on Counts 1, 3, 5 and 7 was that Appellant must have had an "account" as defined in subparagraph (1) of paragraph (c) of Section 24.1 of the Ration Order, was a "depositor" as defined in subparagraph (9) of paragraph (c) thereof, and also that the checks drawn by Appellant were checks as defined in subparagraph (5) of paragraph (c) thereof. Unless the checks were issued on an account of Appellant, they could not be an overdraft.

This Court apparently weighed the evidence on the record and determined that it was sufficient to prove that Appellant was a partner of the West Coast Supply Company, and it thus arrived at the conclusion that the partnership ration bank accounts were accounts of the partnership members. In so doing, this Court completely disregarded the fact that the jury had not passed on the issue of whether Appellant was a partner since the lower court had withdrawn it from the jury. When the lower court instructed the jury, as a matter of law, that the evidence on this particular issue was insufficient and that the jury must find that Appellant was not a partner of the West Coast Supply Company, that issue was withdrawn entirely from the jury's consideration. If this Court concluded that the evidence that Appellant was a partner was sufficient to go to the jury, then there was only one alternative and that was for the Court to reverse the case and send it back for a new trial thereby permitting a jury to pass upon the factual issue as to whether or not Appellant was a member of the partnership. By doing otherwise, this Court invaded the province of the jury and endeavored to determine a question of fact which could be determined in a jury trial only by a jury.

On appeal from a denial of a motion to acquit for lack of evidence as to any material issue, the appellate court may review questions of law only and not questions of fact. As was pointed out by the Supreme Court in *U. S. v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 254, 84 L. Ed. 1129, 1184:

> "His motion for a directed verdict at the conclusion of the case was denied by the trial court and the Circuit Court of Appeals held that there was no error in such denial. A question of law is thus raised,

> which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict."

And, as was said in *Securities and Exchange Commission v. Chenery Corporation,* 318 U. S. 80, 88, 87 L. Ed. 626, 633:

> "But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury."

See, also:

Troxell v. Delaware, Lackawanna & Western R. R. Co., 227 U. S. 434, 444, 57 L. Ed. 586, 591;

Gunning v. Cooley, 281 U. S. 90, 94, 74 L. Ed. 720, 724.

An appeal from a denial of a motion to acquit permits the appellate court to consider whether there was evidence to sustain the verdict and not pass upon the weight of the evidence or to make findings of fact. If there is any issue of fact, it must be determined by the jury, and no issue of fact can be revised by this Court.

Hedderly v. U. S., (9 Cir.) 193 Fed. 561, 571;

O'Leary v. U. S., (9 Cir.) 160 F. 2d 333, 336;

24 *C. J. S.,* p. 670, Sec. 1832; and

24 *C. J. S.,* p. 785, Sec. 1880.

Whether there is a legal sufficiency of evidence in support of a material issue of the case which will warrant its submission to the jury is a question of law for the Court.

See:

Marande v. Texas & Pacific Railway Co., 184 U. S. 173, 46 L. Ed. 487, 494;

State v. Karas, 43 Utah 506, 136 Pac. 788;

Gray v. State, (7 Okl. Cr. 102) 122 Pac. 265;

State v. Flory, 203 Iowa 918, 210 N. W. 961;

State v. Rheams, 58 Minn. 478, 24 N. W. 302;

23 *C. J. S.,* p. 651, Sec. 1139.

The instruction to the jury by the lower court that they must find Appellant was not a partner of West Coast Supply Company was binding upon the jury and it was their duty to follow such instruction. The instructions are the law of the case and bind the jury even though they may be erroneous.

Pelz v. U. S. (2 Cir.), 54 F. 2d 1001;

53 *Am. Jur.* p. 620, Sections 844 and 845.

Furthermore, the reviewing court should presume that the jury followed and applied the charge or instructions given it by the trial court in reaching its verdict.

Gregory v. Morris, 96 U. S. 619, 24 L. Ed. 740;

Clark v. McClurg, 215 Cal. 279, 284, 9 P. 2d 505;

Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873;

3 *Am. Jur.* p. 513, Sec. 951.

It was Appellant's contention at the trial that the evidence was wholly insufficient to show that he was a partner of the West Coast Supply Company, and the District Court agreed with that view, instructing the jury that they were to find that Appellant was not a partner [R. 625]. Irrespective of whether the view taken by the District Court was correct or not, the instruction given by that Court did take away from the jury the opportunity to pass upon that issue so that, when the case came before this Court on appeal, there was no evidence to support the verdict of the jury on the question of whether or not appellant was a member of the partnership if such were required. Under these circumstances, this Court may not conclude guilt from the record, for to do so would be to invade the province of the jury and usurp its functions.

The sole question for determination on this appeal was whether or not there was sufficient evidence to support the verdict of the jury. It is submitted that there was not, for the reason that there was no evidence before the jury to show that Appellant was a patrner of the West Coast Supply Company. The withdrawal of that issue from the jury, whether correct or incorrect, cannot be remedied by this Court except by a return of the case for a retrial and resubmission of the issue in question to a jury. An analogous situation was decided by this Court in *Shaw v. U. S.* (9 Cir.), 131 F. 2d 476. As was pointed out by the Supreme Court in *Bollenbach v. U. S.*, 326 U. S. 607, 614, 90 L. Ed. 350, 355:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, *but*

whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." (Emphasis supplied.)

And again the Supreme Court reiterated in *Bihn v. U. S.*, 328 U. S. 633, 638, 90 L. Ed. 1484, 1488:

> "Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See Bollenbach v. United States, 326 U. S. 607, *ante*, 350, 66 S. Ct. 402."

B. The Decision of This Court Affirming the Judgment of Conviction on Counts 2, 4, 6 and 8 Is Erroneous Because It Is Predicated Upon the Premise That Appellant Was a Partner of the West Coast Supply Company, and the Receiving of the Sugar by West Coast Supply Company Was the Receiving of a Rationed Commodity by Appellant Since He Was a Member of Said Partnership, When the Record Shows That the Lower Court Instructed the Jury, as a Matter of Law, That There Was Insufficient Evidence to Prove That Appellant Was a Member of the Partnership and That the Jury Must Find That Appellant Was Not a Partner of West Coast Supply Company [R. 625].

It appears that this Court affirmed the judgments of conviction on Counts 2, 4, 6 and 8 upon the theory that Appellant received the rationed commodity, to-wit: sugar, as charged in the Information, since he was a partner of the West Coast Supply Company and the evidence showed that the sugar was actually received by that Company. It is true that the record does conclusively show that the

sugar was shipped to and received by the West Coast Supply Company. However, there was no evidence before the jury that Appellant was one of the partners of the West Coast Supply Company.

The District Court specifically directed the jury by an instruction to find that Appellant was not a partner of the West Coast Supply Company [R. 625]. Therefore, the basic support of this Court's decision was wholly lacking, namely, that Appellant was a partner and, that because he was a partner of the West Coast Supply Company, the receipt by that Company was "receipt" by him as charged in Counts 2, 4, 6 and 8 of the Information. What has been heretofore said respecting this Court's power to decide questions of fact which were not submitted to the jury applies with like force and effect here.

One of the grounds of the motion for judgment of acquittal as to Counts 2, 4, 6 and 8 [R. 311-16] and which was renewed at the conclusion of the case [R. 443-51] was that:

> "Respecting Ziegler, (Appellant) as to Counts Two, Four, Six and Eight, there is not one scintilla of evidence, your Honor, that Paul Ziegler ever received one pound of sugar. So I submit those counts I have just enumerated, the receiving counts, a motion as to them properly lies as to Paul Ziegler." [R. 316.]

There can be no question that the evidence contained in the record on this appeal shows that the sugar was received by the West Coast Supply Company. The Govern-

ment introduced in evidence Exhibits 12 through 21, both inclusive, to establish that the sugar was actually delivered to the West Coast Supply Company. Exhibit 12 consisted of invoices to the West Coast Supply Company for sugar [R. 134]. Exhibit 13 consisted of freight bills showing the transfer of sugar to the West Coast Supply Company [R. 135]. Exhibit 14 consisted of delivery receipts showing delivery of sugar to the same Company [R. 135]. Exhibit 15 consisted of four documents showing shipment and delivery of sugar to West Coast Supply Company [R. 159]. Exhibits 16 through 20, both inclusive, were original and photostatic copies of documents showing the transfer of sugar to the West Coast Supply Company [R. 161]. The witness, Robert A. Russell, called by the Government, testified that he was employed by the West Coast Supply Company. He identified his signature on the above mentioned Exhibits [R. 257 *et seq.*]. All Exhibits introduced by the Government relating to delivery of the sugar show delivery to West Coast Supply Company.

The situation respecting Counts 2, 4, 6 and 8 is identical with that of Counts 1, 3, 5 and 7. Without proof that Appellant was one of the partners of the West Coast Supply Company, there is no proof to support the verdict of the jury that he received the sugar as charged in Counts 2, 4, 6 and 8 of the Information. The propositions of law and the authorities heretofore cited in connection with the argument relative to Counts 1, 3, 5 and 7 are equally applicable here.

Conclusion.

It is respectfully submitted that the decision of this Honorable Court is erroneous in the several particulars heretofore set forth, to the detriment and prejudice of the Appellant in this case, and that Appellant is justly entitled to a reconsideration and to a rehearing in order that he may fully and completely present the errors complained of, and that upon further consideration this Court may set aside the conviction of Appellant on each and every count.

Respectfully submitted,

CHARLES H. CARR,
Attorney for Appellant.

Certificate of Counsel.

I, counsel for the above named appellant, do hereby certify that the foregoing Petition for Rehearing of this cause, in my opinion, is well founded, fully justified and that it is not interposed for delay.

CHARLES H. CARR,
Attorney for Appellant.